BELLSOUTH

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May 11, 2005

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended
Docket No. 2005-57-C

Dear Mr. Terreni:

Enclosed for filing are an original and twenty-five copies of BellSouth Telecommunications, Inc.'s Direct Testimony of Kathy K. Blake, the Direct Testimony of P. L. (Scot) Ferguson and the Direct Testimony of Eric Fogle in the above-referenced matter.

By copy of this letter, I am serving all parties of record with a copy of the testimony as indicated on the attached Certificate of Service.

Sincerely,

Patrick Turner

Patrick W. Turner

PWT/nml
Enclosures
cc: All Parties of Record
DM5 # 584923

BELLSOUTH TELECOMMUNICATIONS, INC.

DIRECT TESTIMONY OF KATHY K. BLAKE

BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2005-57-C

MAY 11, 2005

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH"), AND YOUR BUSINESS ADDRESS.

A. My name is Kathy K. Blake. I am employed by BellSouth as Director – Policy Implementation for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. PLEASE PROVIDE A BRIEF DESCRIPTION OF YOUR BACKGROUND AND EXPERIENCE.

A. I graduated from Florida State University in 1981 with a Bachelor of Science degree in Business Management. After graduation, I began employment with Southern Bell as a Supervisor in the Customer Services Organization in Miami, Florida. In 1982, I moved to Atlanta where I held various positions involving Staff Support, Product Management, Negotiations, and Market Management within the BellSouth Customer Services and Interconnection Services Organizations. In 1997, I moved into the State Regulatory Organization with various responsibilities for testimony preparation, witness

support and issues management. I assumed my currently responsibilities in July 2003.

Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY?

A. The purpose of my testimony is to provide BellSouth's position on the unresolved policy issues raised in the Joint Petition For Arbitration, filed March 11,2005, with the Public Service Commission of South Carolina ("Commission") on behalf of NewSouth Communications Corp. ("NewSouth"), NuVox Communications, Inc. ("NuVox"), KMC Telecom V, Inc. ("KMC V") and KMC Telecom III LLC ("KMC III") (collectively, "KMC"), and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC ("Xspedius Switched"), Xspedius Management Co. of Charleston, LLC ("Xspedius Charleston") Xspedius Management Co. of Columbia, LLC ("Xspedius Columbia") Xspedius Management Co. of Greenville, LLC ("Xspedius Greenville") Xspedius Management Co. of Spartanburg, LLC ("Xspedius Spartanburg") (collectively, "Xspedius"). I henceforth refer to these companies as the "Joint Petitioners." I specifically address the issues that relate to the General Terms and Conditions section of the proposed Agreement as well as Attachments 2, 3, 6, and 7. Further, I provide supporting evidence that the interconnection agreement language proposed by BellSouth is the appropriate language that should be adopted for this interconnection agreement by the Commission.

Q. PLEASE IDENTIFY BELLSOUTH'S WITNESSES AND THE UNRESOLVED ISSUES THEY ADDRESS IN THEIR DIRECT TESTIMONY.

A. The chart below identifies the BellSouth witnesses and the unresolved issues they address in whole or in part in their Direct Testimony:

Witness	Issue Nos.
Kathy Blake	Item Nos. 2, 4-7, 9, 12, 23, 26, 51, 65, 88, 97, 100-102, 104, and Supplemental Issues 108-114
Eric Fogle	Item Nos. 36-38, 46
Scot Ferguson	Item Nos. 86, 103

Q. DO YOU HAVE ANY PRELIMINARY COMMENTS?

A. Yes. There are numerous unresolved issues in this arbitration that have underlying legal arguments. Because I am not an attorney, I am not offering a legal opinion on these issues. I respond to these issues purely from a policy perspective. BellSouth will address all legal arguments in its post-hearing brief.

Q. CAN YOU PLEASE EXPLAIN THE PROCEDURAL POSTURE OF THE ARBITRATION?

A. Yes. The Joint Petitioners originally filed a Petition for Arbitration with the Commission on February 11, 2004, and the Commission assigned Docket No. 2004-42-C to that Petition. BellSouth answered that Petition and the parties filed testimony in that docket, but no hearing was held because, on July 16, 2004, the parties filed a Joint Motion to Withdraw Petition for Arbitration in order to incorporate the negotiation of those issues precipitated by the D. C. Circuit's decision in *United States Telecom Ass'n v.* FCC, 359 F.3d 554 (D.C. Circuit 2004) ("*USTA II*"), and to continue to negotiate previously identified issues outstanding between the Joint Petitioners and BellSouth. The Commission granted the Joint Motion for Leave to Withdraw on October 6, 2004 in its Order No 2004-472.

Subsequently, the Federal Communications Commission ("FCC") issued its *Interim Rules* Order, and later, the FCC adopted Final Unbundling Rules in its *Triennial Review Remand Order* ("*TRRO*"). These final unbundling rules became effective on March 11, 2005.

On that same date, the Joint Petitioners filed a new Petition for Arbitration, which is the subject of this proceeding. The Commission assigned the matter Docket No. 2005-57-C. The Issues Matrix attached to the Joint Petitioner's Petition for Arbitration includes those issues that remain from the original arbitration proceeding as well as several supplemental issues relating to *USTA II* and the *Interim Rules Order* ("Supplemental Issues"). These Supplemental

Issues are identified as Item Nos. 108 through 114[1] in the Joint Issues Matrix this is attached as Exhibit "A" to the Response that BellSouth filed in this docket on April 5, 2005. The Supplemental Issues do not substantively address the *TRRO*, and the Parties have not yet negotiated the *TRRO*[2]

Q. HOW IS YOUR TESTIMONY ORGANIZED?

A. First, I will provide BellSouth's position on the Supplemental Issues. Next, I will identify other issues that BellSouth believes should be moved to the pending generic docket. Finally, I will present BellSouth's position on the remaining, Unresolved Issues.

SUPPLEMENTAL ISSUES

Q. HOW SHOULD THE COMMISSION HANDLE THE SUPPLEMENTAL ISSUES?

A. Because of the *TRRO*, the Parties have agreed that several of the Supplemental Issues (Issues 109, 110, and 112) are moot.

The Parties also have agreed that the remaining Supplemental Issues and one

[1] As set forth in my testimony, BellSouth does not agree that all of the asserted supplemental issues are appropriate for arbitration.

[2] Any cite to the *TRRO* in this testimony is merely to point out substantive changes in the law that have transpired since the identification of the Supplemental Issues.

of the Unresolved Issues (Issues 23, 108, 111, 113, and 114) should be moved to the Commission's Generic Proceeding (Docket No. 2004-316-C) for consideration and resolution. The parties believe that moving these issues to the pending Generic Proceeding is appropriate because these issues are impacted by the *TRRO* and should be addressed in the Generic Proceeding. Thus, as they have done in proceedings in other states, the Parties anticipate filing a Joint Motion in the near future identifying for the Commission both those Supplemental Issues that have been withdrawn from the arbitration as a result of being rendered moot by the *TRRO*, as well as those issues that the Parties are asking the Commission to move to the Generic Proceeding.

Q. DO YOU ADDRESS THE SUPPLEMENTAL ISSUES AND ISSUE 23 IN YOUR DIRECT TESTIMONY?

A. No. In light of the matters I have just addressed, I do not address the Supplemental Issues in my Direct Testimony. I reserve the right to address these issues in my Rebuttal Testimony in the unlikely event that the need to do so arises.

OTHER ISSUES THAT SHOULD BE MOVED TO THE PENDING GENERIC PROCEEDING

Q. SHOULD ANY OTHER ISSUES BE MOVED TO THE GENERIC PROCEEDING FOR CONSIDERATION AND RESOLUTION?

A. Yes. Although the Joint Petitioners apparently disagree, BellSouth believes that other issues in this proceeding are related to the *TRO* (Issues 26, 36-38, and 51) and, therefore, that those issues should be moved to the pending Generic Proceeding. These issues are also likely to be addressed in the Generic Proceeding.

BellSouth believes it is neither necessary nor appropriate to expend the time and resources of the Commission, the Office of Regulatory Staff ("ORS"), and the Parties to address Issues 26, 36-38, and 51 in the context of this Section 252 arbitration when the same issues are likely to affect all CLECs in South Carolina that have interconnection agreements with BellSouth. Instead, BellSouth believes that these issues should be addressed in the Generic Proceeding, where all affected entities will have the opportunity to be heard on these issues and the Commission can render a single decision applicable to all affected entities. In addition to duplicating scarce resources, the piecemeal approach proposed by the Joint Petitioners also presents the risk of inconsistent decisions being rendered in this docket and the Generic Docket.

The Joint Petitioners would not be prejudiced if the Commission moves these issues to the pending Generic Docket because they are actively participating in the Generic Proceeding. At a minimum, if the Commission does not move these issues the Generic Docket, the Commission should defer resolution of these issues until its decision in the Generic Proceeding to avoid inconsistent rulings.

UNRESOLVED ISSUES

Item 2; Issue G-2: How should "End User" be defined? (GT&C Section 1.7)

Q. PLEASE BRIEFLY DISCUSS THE PARTIES' DISAGREEMENT OVER THE DEFINITION OF "END-USER."

A. BellSouth's concern with this issue is that the Joint Petitioners' proposed definition – the customer of a party – could be interpreted as allowing the Joint Petitioners to obtain UNEs in violation of the Act. In contrast, the Joint Petitioners' concern was that BellSouth's original definition – ultimate user of the telecommunications service – could be read to unnecessarily restrict their right to receive UNEs.

Q. HAS BELLSOUTH PROPOSED LANGUAGE RELATIVE TO THE DEFINITION OF "END-USER" TO ADDRESS THE JOINT PETITIONERS' CONCERNS?

A. Yes. BellSouth recently proposed three separate and detailed definitions for the purposes of this arbitration:

- ***End User**, as used in this Interconnection Agreement, means the retail customer of a Telecommunications Service, excluding ISPs/ESPs, and does not include Telecommunications carriers such as CLECs, ICOs and IXCs.* This definition is intended to distinguish between the customers that the industry typically considers to be End Users, i.e. the retail customer that picks the phone up and uses it to make or receive calls, and a carrier that is the wholesale customer of a telecommunications carrier, e.g., for transport

services. An example of the appropriate use of the term End User would be where a residential retail service is discussed in the context of resale - clearly, a carrier would not fall into this definition.

- ***Customer**, as used in this Interconnection Agreement, means the wholesale customer of a Telecommunications Service that may be an ISP/ESP, CLEC, ICO or IXC.* This definition is used in situations where the provision of a service is to a carrier, such as an IXC or another CLEC. An example would be in the provision of EELs. The FCC expressly stated that the EEL eligibility criteria apply whether the CLEC is using the service for the provision of retail services (i.e., to a traditional End User) or wholesale services (e.g., where a CLEC purchases an EEL, terminating to an End User customer premises, and sells that EEL on a wholesale basis to another carrier that will then provide the service to the End User).

- ***end user**, as used in this Interconnection Agreement, means the End User or any other retail customer of a Telecommunications Service, including ISPs/ESPs, CLECs, ICOs and IXCs, that are provided the retail Telecommunications Service for the exclusive use of the personnel employed by ISPs/ESPs, CLECs, ICOs and IXCs, such as the administrative business lines used by the ISPs/ESPs, CLECs, ICOs and IXCs at their business locations, where such ISPs/ESPs, CLECs, ICOs and IXCs are treated as End Users.* This definition addresses circumstances where a carrier, such as an IXC, is actually an End User in the traditional sense of the word. This situation would arise where, for example, a carrier needs to purchase lines for its own communications needs, such as for its administrative business office needs. While that carrier would not be the recipient of those services on a wholesale basis, in the event that the situation presented itself, Joint Petitioners would be entitled to purchase such services pursuant to the ICA for the provision of services to the carrier for its administrative purposes.

Q. WHY DID BELLSOUTH OFFER THIS NEW LANGUAGE?

A. Throughout this arbitration, the Joint Petitioners raised concerns with respect to how the term "End User" was defined and whether the definition could preclude the Joint Petitioners from receiving UNEs, including receiving UNEs

for the wholesale provision of services. BellSouth's position has consistently been that the Joint Petitioners can obtain UNEs for the provision of services in accordance with applicable FCC and Commission rules - and, in fact, language expressly addressing the use of UNEs is included as agreed-upon language in Section 1.2 of Attachment 2 in the Agreement. The Joint Petitioners, however, continued to raise concerns with respect to the definition of the term "End User" and how that definition would impact the already-agreed-upon language. In an effort to resolve this issue, BellSouth developed a more detailed set of definitions to address the Joint Petitioners' concerns. These definitions should alleviate any unfounded concerns that the Joint Petitioners have that BellSouth is attempting to limit the Joint Petitioners' rights to receive UNEs in accordance with the law. BellSouth's proposed language is appropriate, and it addresses BellSouth's concerns while at the same time addressing the Joint Petitioners' concerns that BellSouth's definition limits who their customers can be.

Items 4 through 7:

Q. BEFORE ADDRESSING ITEMS 4 THROUGH 7 INDIVIDUALLY, COULD YOU ADDRESS THEM AS A GROUP?

A. Yes. It is important to note in addressing Item Nos. 4 through 7 that these issues are all integrally related and should be considered together. It is BellSouth's belief that, by attempting to increase BellSouth's exposure to liability through decreased limitations of liability and expanding BellSouth's

indemnification obligations to essentially cover all failures by BellSouth to perform exactly as the contract requires, the Joint Petitioners are attempting to have BellSouth incur the Joint Petitioners' cost of doing business and have BellSouth bear the risk of the business decisions that the Joint Petitioners choose to make.

When viewed in a vacuum, some of the Joint Petitioners' positions may seem to be reasonable; even more so when viewed in the context of a truly commercially negotiated agreement free from regulation, where prices can be increased to account for increased liability exposure. However, such is not the case here. BellSouth is bound by the cost-based pricing standards of the 1996 Act and cannot change such prices at will to cover the additional costs that would be incurred should the Joint Petitioners' language be adopted. In a legally mandated context, where prices are set based on TELRIC principles, and when taken together and viewed in the context of the Joint Petitioners' end users being able to recover damages from BellSouth even when BellSouth has no relationship with the Joint Petitioners' end users, it is clear that all the Joint Petitioners seek to do is put themselves at a competitive advantage over BellSouth and all other carriers by having BellSouth assume the risk of their business decisions.

Item 4; Issue G-4: What should be the limitation on each Party's liability in circumstances other than gross negligence or willful misconduct? (GT&C Section 10.4.1)

Q. WHAT IS BELLSOUTH'S POSITION ON ISSUE 4?

A. The limitation on each Party's liability in circumstances other than gross negligence or willful misconduct should be the industry standard limitation, which limits the liability of the provisioning party to a credit for the actual cost of the services or functions not performed or improperly performed.

Q. PLEASE COMMENT ON THE JOINT PETITIONERS' PROPOSAL.

A. First, the Joint Petitioners' proposal makes no sense. They propose that liability be 7.5% of whatever has been billed as of the day on which the claim arose. Under the Joint Petitioners' language, at the beginning of the Agreement, the limitation would limit liability to $0.00 (because nothing would have been billed). By the end of the three-year contract term, the cumulative billing over the period of the contract would result in massive potential liability for a claim that, if it had arisen at the beginning of the Agreement, would have been limited to $0.00. There is no rational basis for such a liability clause, which is completely unrelated to the severity of the damage or to any other rational basis for limiting damages. Instead, the Joint Petitioners propose an arbitrary approach that would limit damages based on the happenstance at the point during the contract at which the event in question occurs.

Further, the language proposed by the Joint Petitioners would provide incentive to the Joint Petitioners to inappropriately delay the filing of a claim

or inappropriately argue that the "day the claim arose" was at the end of the Agreement. Based on the amount of billing between the parties, the day the Joint Petitioners assert that the term, "the claim arose", could result in only a few dollars or result in several million dollars. The Joint Petitioners' proposal serves only to encourage CLECs to game the claims and litigation process to increase BellSouth's potential liability.

The Joint Petitioners argue that such a provision is reasonable because, they claim, such provisions are common in commercial agreements. The Joint Petitioners, however, fail to acknowledge or to bring to this Commission's attention the fact that Interconnection Agreements are not commercial agreements. The services that BellSouth is required to provide are mandated by law, the rates that BellSouth is permitted to charge are set by this Commission, and the terms and conditions under which these services are provisioned are dictated, in many instances, as a result of arbitration decisions. These are not commercial agreements but are instead interconnection agreements mandated under Sections 251 and 252 of the 1996 Act.

BellSouth is asking no more than the industry standard limitation and for the incorporation of limitation of liability language that is consistent if not identical to the language that the Joint Petitioners use with their own customers. This is the same language that BellSouth uses for its customers in its tariffs and is the same language that BellSouth is requesting that the Commission adopt in this proceeding. For the foregoing reasons, BellSouth requests the Commission adopt BellSouth's proposed language containing

industry standard limitations on liability and reject the Petitioners' proposed language.

Q. HAS THE FCC ADDRESSED LIMITATION OF LIABILITY IN THE CONTEXT OF INTERCONNECTION AGREEMENTS?

A. Yes. The FCC's Wireline Competition Bureau held in the *Virginia Arbitration Order* that ILECs should treat CLECs the same way the ILEC treats its retail customers in regards to limitation of liability. *See In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State* Corporation, CC Docket No. 00-251, 17 FCC Rcd. 27,039 (Jul. 17, 2002) ("*Virginia Arbitration Order*") at ¶ 709. Other state commissions have come to similar conclusions. *Sprint Communications, LP*, Case No. 96-1021-TP-ARB (Ohio P.U.C. Dec. 27, 1996) ("The panel does not believe that GTE's proposal to limit its liability to Sprint to the same degree it limits its liability to its own retail customers is unreasonable... In accordance with the Commission's award in 96-832, it is appropriate for GTE to limit its liability in the same manner in which it limits its liability to its customers."); *In the Matter of the Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.*, Docket No. 05-BTKT-365-ARB at 102 (Feb. 16, 2005) (refusing to adopt the Joint Petitioners' and CLEC proposal for limitation of liability language that exceeded bill credits).

Q. HOW DOES THE LANGUAGE BELLSOUTH IS PROPOSING COMPARE

TO THE LIMITIATION OF LIABILITY LANGUAGE THAT APPLIES TO BELLSOUTH'S RETAIL CUSTOMERS?

A. It is the same. BellSouth treats its retail customers in the same manner as its retail tariff limits BellSouth's liability to its end users to bill credits. *See* BellSouth's GSST at § A2.5.1 (attached hereto as Exhibit KKB-2). BellSouth's language on this issue does exactly what the FCC and other state commissions have determined it is obligated to provide in a 252 agreement – treat the CLECs the same that it treats its own customers.

Q. HOW DO THE JOINT PETITIONS TREAT THEIR OWN RETAIL CUSTOMERS WITH REGARD TO LIABILITY LIMITATIONS?

A. Consistent with the language BellSouth is proposing. Each of the Joint Petitioners limit their liability to their own end users to bill credits, which is exactly what BellSouth is proposing in this arbitration. *See* KMC's Tariff at § 2.1.4; NuVox's Tariff at § 2.1.4; Xspedius' Tariff at § 2.1.4, collectively attached hereto as Exhibit KKB-1.

Apparently, the standard employed by BellSouth and the standard employed by the Joint Petitioners for their own end users (bill credits) is not good enough for the Joint Petitioners in this arbitration and thus the hypocritical position of the Joint Petitioners should be rejected.

Item 5; Issue G-5: If the CLEC does not have in its contracts with end users and/or

tariffs standard industry limitations of liability, who should bear the resulting risks? (GT&C Section 10.4.2)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. BellSouth believes that in this situation, the CLEC should bear the resulting risk. The purpose of this provision is to put BellSouth in the same position that it would be in if the Joint Petitioners' end user was a BellSouth end user. BellSouth believes that if a CLEC elects not to limit its liability to its end users/customers in accordance with industry norms, the CLEC should bear the risk of loss arising from that business decision. Further, if a CLEC wants to make a product more attractive by offering a service guaranty, there is nothing to stop the CLEC from doing so. It is not appropriate, however, to offer a product under terms that differentiate it from other providers' products and expect BellSouth to pay when BellSouth does not meet the service date the CLEC promised in its service guaranty.

Q. PLEASE PROVIDE AN EXAMPLE OF WHAT THE PETITIONERS ARE REQUESTING.

A. The Petitioners appear to be giving to their end users on the one hand, and taking from BellSouth on the other. For example, under the Petitioners' language, a CLEC could offer its end user $1,000.00 per loop if the CLEC does not deliver the loop within the interval promised. If, for whatever reason, BellSouth were unable to deliver a loop within the stated interval, the CLEC

would then pass on to BellSouth the CLEC's self-created liability to its customers. This approach is not only obviously unfair; it violates the spirit of the 1996 Act. BellSouth is required to provide service to the CLEC at parity to what it provides to its retail customers. Under the Petitioners' approach, the CLEC could promise its customer perfection to make the service more attractive, then hold BellSouth financially accountable if the wholesale input provided by BellSouth falls short of the perfect performance needed to meet the CLEC's guaranty to its customer.

Q. WHY IS THE OUTCOME OF THIS ISSUE IMPORTANT TO BELLSOUTH?

A. BellSouth does not have a contract with the Joint Petitioners' end users and the Joint Petitioners' end users do not purchase services out of BellSouth's tariffs. If they did, they would be subject to BellSouth's tariffs, which limit BellSouth's liability to bill credits.

Thus, if the Joint Petitioners make the business decision not to avail themselves of the industry standard liability limitations, BellSouth should not incur any greater liability that it would incur to its own end user in that situation.

This issue, therefore, is not about BellSouth obtaining a competitive advantage but in making sure BellSouth is not ***disadvantaged*** solely as a result of a Joint Petitioner business decision.

Q. ARE THE PARTIES' CURRENTLY OPERATING UNDER THE TYPE OF LANGUAGE BELLSOUTH IS PROPOSING REGARDING THIS ISSUE?

A. Yes. The language BellSouth is proposing is in the Joint Petitioners' current agreement with BellSouth, and I am unaware of any dispute between the parties over its application, interpretation, or enforcement.

Q. DO THE JOINT PETITIONERS CURRENTLY HAVE LIMITATION OF LIABILITY LANGUAGE IN THEIR TARIFFS?

A. Yes. All of the Joint Petitioners use limitation of liability language to protect themselves, and in some cases their language provides them with more protection that BellSouth's language provides. For instance, NuVox limits its liability for gross negligence to $10,000. *See* NuVox Tariff at § 2.1.4(B)., Exhibit KKB-1. Likewise, KMC limits its liability for "any claim, loss, damage or expense from any cause whatsoever," to "the sums actually paid by the Customer for the specific services giving rise to the claim." *See* KMC Tariff at § 2.1.4(H), Exhibit KKB-1.

Q. EARLIER YOU MENTIONED A SCENARIO IN WHICH BELLSOUTH DOES NOT PROVISION A LOOP TO A CLEC WITHIN THE APPLICABLE INTERVAL. IS THERE A MECHANISM IN PLACE TO COMPENSATE A CLEC WHEN THAT HAPPENS?

A. Yes. In accordance with the Service Quality Measurement Plan and the associated Incentive Payment Plan, both of which have been approved by this Commission, BellSouth is subject to the paying Tier I penalties to CLECs for failure to provision UNEs within the applicable interval or pursuant to the established measurement. Any additional compensation is inappropriate and should be rejected.

Item 6; Issue G-6: How should indirect, incidental or consequential damages be defined for purposes of the Agreement? (Agreement GT&C Section 10.4.4)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. Indirect, incidental or consequential damages should be defined according to the pertinent state law. Although I am not an attorney, it is generally known that, in every state, there is a body of law that has developed as the courts have defined the parameters of what constitutes "indirect, incidental or consequential damages." This definition should control rather than some different definition created by the Joint Petitioners.

Q. HOW HAVE THE JOINT PETITIONERS RESPONDED TO BELLSOUTH'S POSITION?

A. The Joint Petitioners have agreed that the contract should provide that there will be no liability for incidental, indirect or consequential damages, but they also attempt to define these terms in a way that contradicts that agreement by

affording their end users or the Joint Petitioners, vis-à-vis their end users, certain rights against BellSouth.

In other words, both parties agree that there should be no liability for these particular types of damages. The Joint Petitioners, however, have proposed to write into the contract a lengthy and confusing set of circumstances under which liability would attach, even if the damages for which there would be liability are "indirect, incidental or consequential." Again, the result is that the agreed-upon limitation of liability would be eviscerated.

If the parties agree that, for example, consequential damages should not be recoverable, then this agreement can really only be given full effect if all damages of this sort are excluded. It makes no sense to agree that there should be no liability for damages of a particular type, and then qualify that agreement to such an extent that it effectively ceases to exist. This, however, is exactly what the Petitioners are attempting to do.

Q. ARE YOU OPPOSED TO THE JOINT PETITIONERS' APPROACH FOR ANY OTHER REASON?

A. Yes, BellSouth is also opposed to the "qualifying" language proposed by the Joint Petitioners because it is extremely vague and would be extremely difficult to implement. The Joint Petitioners have proposed to add a single clause of more than 100 words to this section of the Agreement that is so convoluted that it is virtually indecipherable. The result of this addition would

be to create considerable confusion as to when the limitation of liability that the parties have otherwise already agreed upon would, or would not, apply.

Further, adoption of the Joint Petitioners' language actually could negate other, agreed upon rights. For instance, even though the Parties have agreed that there should be some limitation of liability between them, the Joint Petitioners' language is contrary to this agreement because it excludes the limitation of liability provision for damages "incurred by such other Party vis-à-vis its End Users." Thus, as long as the Joint Petitioners brought a claim for damages incurred by the Joint Petitioners "vis-à-vis its End Users" (whatever that may mean), BellSouth's liability to the Joint Petitioners could be unlimited. Again, this is contrary to the Parties' agreement that there should be a limitation of liability.

Item 7; Issue G-7: What should the indemnification obligations of the parties be under this Agreement? (Agreement GT&C Section 10.5)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. The Party providing services under the agreement, its Affiliates and its parent company, shall be indemnified, except to the extent caused by the providing Party's gross negligence or willful misconduct, defended and held harmless by the Party receiving services hereunder against any claim, loss or damage arising from the receiving Party's use of the services provided under this Agreement pertaining to (1) claims for libel, slander or invasion of privacy

arising from the content of the receiving Party's own communications, or (2) any claim, loss or damage claimed by the End User of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties, or obligations arising out of this Agreement.

Q. PLEASE FURTHER EXPLAIN BELLSOUTH'S POSITION.

A. Although it is appropriate for the receiving party to indemnify the providing party, it is not appropriate for the party providing the services to indemnify the party receiving services in this instance as the Joint Petitioners are suggesting. It is important to recognize that interconnection agreements mandated by Sections 251 and 252 of the 1996 Act are not commercial agreements. Contracts achieved through Sections 251 and 252 have a long history beginning with the 1996 Act and continuing through individual arbitration proceedings in each of the states. What must be offered and the standards that apply to those offerings is, in part, drawn from the language of the 1996 Act, and in part, the result of eight years of decisions by the FCC and various state commissions. As noted under Issue 4, the services included in a Section 251 agreement are provided on the basis of TELRIC pricing and TELRIC pricing does not include the cost of open-ended indemnification of the party receiving services. If one of the costs of providing UNEs and interconnection is damage payments that the Petitioners seek through their language, then those damages should also be recovered through the cost of UNEs and interconnection. However, this is not the case.

BellSouth is not dictating a course of action for the Joint Petitioners. Simply stated, if the Joint Petitioners would limit their liability to their end users through their tariffs or contracts, as telecommunications carriers typically do, there would be no issue to resolve.

Item 9; Issue G-9: Should a court of law be included in the venues available for initial dispute resolution for disputes relating to the interpretation or implementation of the Interconnection Agreement? (Agreement GT&C Section 13.1)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. BellSouth's position is that the Commission or the FCC should be the first venue to resolve disputes as to the interpretation of the Agreement or as to the proper implementation of the Agreement. However, in an effort to accommodate the Joint Petitioners' desire to broaden the venues available to them, BellSouth has proposed language that would enable the Joint Petitioners to petition a court for matters that lie outside the jurisdiction or expertise of the Commission or the FCC.

Q. WHAT IS THE RATIONALE FOR BELLSOUTH'S POSITION?

A. Interconnection agreements achieved through voluntary negotiations or through compulsory arbitration are bound by Section 252 of the Act. Specifically, Section 252(e)(1) requires that any interconnection agreement

adopted by negotiation or arbitration be submitted to the state commission for approval. As such, having approved an agreement, the state commission should also resolve any dispute regarding the agreement. To the extent that the FCC has regulatory oversight over ILECs and CLECs and their obligations under the Act, it may also act in its regulatory capacity to resolve disputes resulting from interconnection agreements. It is the state commissions and the FCC that have the expertise in these matters. In contrast, courts generally lack the technical expertise or background necessary to serve as the initial venue for an interconnection agreement dispute resolution. Additionally, often the terms and conditions that are included in an interconnection agreement result from an arbitration decision or the language is crafted from a rule or order written by the FCC or this Commission. Clearly, the regulatory bodies that dictate how the services are to be provisioned pursuant to an interconnection agreement are best suited to interpret and enforce those provisions. Should the issue eventually go to a court, the parties, the state commission and/or FCC would be able to supply a full record of the dispute to the court to use during its deliberations.

BellSouth is not attempting to exclude courts as dispute resolution venues. BellSouth's position is simply that courts should not be the first step in resolving a dispute arising out of these regulatory obligations when the state commission or the FCC possess the expertise to decide the matter. In fact, BellSouth's position is that, for those matters that lie outside the jurisdiction or expertise of the Commission or the FCC, the parties would be entitled to seek resolution of the dispute through another venue, such as a court of law.

Item 12; Issue G-12: Should the Agreement explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties? (GT&C Section 32.2)

Q. DOES BELLSOUTH BELIEVE SUCH LANGUAGE SHOULD BE INCLUDED IN THE AGREEMENT?

A. No, such an explicit statement in the Agreement is not necessary. Although the Joint Petitioners' position appears reasonable on its face, it is important to understand how this issue has arisen, as well as the subtext of the Joint Petitioners' proposal.

Q. PLEASE EXLAIN.

A. It appears that the Joint Petitioners' purpose with this issue is to insure that they get at least two opportunities to negotiate and/or arbitrate the terms of the contract. Once the initial terms are settled and the parties sign the Agreement, the Agreement should control on all negotiated items. In an attempt to resolve this issue, BellSouth has offered to include the following language in the General Terms and Conditions of the parties' Agreement:

> This Agreement is intended to memorialize the Parties' mutual agreement with respect to their obligations under the Act and applicable FCC and Commission rules and orders. To the extent that either Party asserts that an obligation, right or other requirement not expressly

> memorialized in the agreement is applicable to the Parties by virtue of a reference to an FCC or Commission rule or order or Applicable Law in the Agreement, and such obligation, right or other requirement is disputed by the other Party, the Party asserting that such obligation, right or other requirement is applicable shall petition the Commission for resolution of the dispute and the Parties agree that any finding by the Commission that such obligation, right or other requirement exists shall be applied prospectively by the Parties upon amendment of the Agreement to include such obligation, right or other requirement and any necessary rates, terms and conditions. The Party that failed to perform such obligation, right or other requirement shall be held harmless from any liability for such failure until the obligation, right, or other requirement is expressly included in this Agreement by amendment hereto.

The Joint Petitioners' proposed language would allow them to search an order after finalizing the Agreement to find language different from that in the Agreement, and to use that difference to reopen negotiations or to assert a complaint even if the language that is in the Agreement reflects the parties' attempt to implement the requirements of the order. In this manner, nothing is truly settled and the initial contract language is meaningless. The Joint Petitioners should not be able to use this issue to get "two bites at the apple."

Q. PLEASE PROVIDE SUPPORT FOR BELLSOUTH'S POSITION.

A. Sometimes there is a question of how to implement an FCC rule, especially in light of language that appears in the order that first sets forth the rule. In this instance, the parties would normally review the ordering paragraphs and enter into discussions in an attempt to clarify the meaning of the rule and

subsequently develop contract language. Although the Joint Petitioners spent approximately 18 months fully negotiating every aspect of this Agreement, they still want additional language in the General Terms as a "catch-all" for anything they did not negotiate specifically.

There are countless examples of language in the Agreement where the parties have disagreed on the meaning of a rule and, in an effort to negotiate mutually agreeable, contractually binding provisions, the parties have looked to the order for clarification. In some instances, the parties have reached agreement and have drafted mutually agreeable contract provisions. In other cases, the parties were unable to agree and are now arbitrating the issues. Examples of those two scenarios where the Parties are either agreeing to language different from the rule or arbitrating the meaning of the rule based on the *TRO*, include language relating to the definition of interoffice transport, line conditioning, co-carrier cross connects, dedicated transport as it relates to reverse collocation, fiber to the home, and conversions from unbundled network elements to wholesale services.

What the Joint Petitioners seek to do is create a third category, contract language that has been agreed to and that set forth the respective obligations of the parties and yet may later be challenged by a Petitioner as not truly reflecting what the Parties had agreed to. In that manner, as explained above, the Petitioners would always get "two bites at the apple" - the first bite during contract negotiations and arbitration of those provisions where agreement was not reached and the second bite at some later, unspecified time, when they

would seek out some aspect of an order and, based on their interpretation at that point in time, they would allege that BellSouth had violated its obligations under the Agreement. This would put BellSouth in the intolerable position of not knowing exactly what its contractual obligations are until the Joint Petitioners alleged they had violated them. The main purpose of negotiation and arbitration is to resolve such issues at the initiation of the contract so that the parties can live up to its terms for the life of the contract.

In contrast to the Joint Petitioners' language, BellSouth's proposed language acknowledges an underlying obligation to provide services in accordance with applicable rules, regulations, etc. and that the parties have negotiated what those obligations are. However, in the unlikely event that an issue arises in the future wherein a party asserts that there is an obligation that has not been included in the agreement based on the law at the time the agreement was entered into, and the parties had not otherwise negotiated their obligations with respect thereto, then the parties will attempt to resolve that issue by amending the agreement to include such obligation. In the event that the parties cannot agree on what the obligation is, or if there even is an obligation, then the commission should resolve that dispute. In the event that an obligation exists that was not previously included in the interconnection agreement, the parties should then amend the agreement *prospectively* to include such an obligation. To require either party to comply with an obligation that was not known, due to differing interpretations of the order, for example, would be inappropriate. BellSouth is not attempting to avoid its obligations under the law; it is simply trying to ensure that it knows what those obligations are so that it can comply

with them.

Item 23; Issue 2-5: What rates, terms and conditions should govern the CLECs' transition of existing network elements that BellSouth is no longer obligated to provide as UNEs to other services? (Attachment 2, Section 1.5)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. This is an issue that the Parties agree should be moved to the pending Generic Proceeding. Thus, I will not address this issue in my Direct Testimony, but I reserve the right to address this issue in my Rebuttal Testimony in the unlikely event that the need to do so arises.

Item 26; Issue 2-8: Should BellSouth be required to commingle UNEs or Combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act? (Attachment 2, Section 1.7)

Q. DO YOU HAVE ANY PRELIMINARY COMMENTS REGARDING THIS ISSSUE?

A. Yes. Because this issue is similar if not identical to an issue being addressed in the Generic Proceeding, BellSouth submits that the Commission should move this issue to the Generic Proceeding for consideration and resolution. The Joint Petitioners, however, do not agree, so I will present BellSouth's position on this issue in my direct testimony.

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. As I explain below, consistent with the FCC's errata to the *Triennial Review Order*, there is no requirement to commingle UNEs or UNE combinations with services, network elements or other offerings made available only pursuant to Section 271 of the 1996 Act. Unbundling and commingling are Section 251 obligations. Services not required to be unbundled are not subject to Section 251. When BellSouth provides an item pursuant only to Section 271, BellSouth is not obligated by the requirements of Section 251 to either combine or commingle that item with any other element or service. If BellSouth agrees to do so, it will be done pursuant to a commercial agreement.

Q. PLEASE EXPLAIN YOUR REFERENCE TO THE FCC's *TRIENNIAL REVIEW ORDER* ERRATA.

A. In its original *TRO* at paragraph 584, the FCC stated: "As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act." However, in its errata released September 17, 2003, the FCC specifically amended paragraph 584 to delete any reference to section 271. The amended sentence now reads as follows: "As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities

and services, including any services offered for resale pursuant to section 251 (c)(4) of the Act."

In making this change, the FCC correctly noted that there are network elements identified in section 271 that are no longer subject to section 251 unbundling requirements. The FCC has clarified that BellSouth is only obligated to permit commingling between UNEs and UNE combinations (subject to section 251) and wholesale facilities and services.

Q. DOES THE D.C. CIRCUIT'S DECISION, ISSUED ON MARCH 2, 2004, SUPPORT BELLSOUTH'S POSITION ON THIS ISSUE?

A. Yes. In its discussion of "Section 271 Pricing and Combination Rules", the D.C. Circuit agreed with the FCC's determination for checklist items four (loops), five (transport), six (switching) and ten (call-related databases) regarding TELRIC pricing and the duty to combine. First, the Court stated

> ...The FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-252. ...
>
> But the FCC also found that the BOCs' unbundling obligations under the independent checklist items differed in some important respects from those under §§ 251-252. Two such differences are salient here. First, the Commission determined that TELRIC pricing was not appropriate in the absence of impairment; for elements for which unbundling was required only under § 271, the ruling criterion is the §§ 201-02 standard that rates must not be unjust, unreasonable, or unreasonably

> discriminatory. Order ¶¶ 656-64. Second, the Commission decided that, in contrast to ILEC obligations under § 251, the independent § 271 unbundling obligations didn't include a duty to combine network elements.

USTA, 359 F.3d at 588-589.

Further, the D.C. Circuit stated: "We agree with the Commission that none of the requirements of § 251(c)(3) applies to items four, five, six and ten on the § 271 competitive checklist. Of course, the independent unbundling under § 271 is presumably governed by the *general* nondiscrimination requirements of § 202." Id. at 589. Therefore, it is clear that both the FCC and D.C. Circuit have determined that there is no requirement to commingle UNEs or UNE combinations with services, network elements or other offerings made available only pursuant to Section 271 of the 1996 Act.

Item 51; Issue 2-33: (B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include? (C) Who should conduct the audit and how should the audit be performed? (Attachment 2, Sections 5.2.6, 5.2.6.1, 5.2.6.2, 5.2.6.2.1 & 5.2.6.2.3)

Q. DO YOU HAVE ANY PRELIMINARY COMMENTS REGARDING THIS ISSSUE?

A. Yes. Because this issue is similar if not identical to an issue being addressed in the Generic Proceeding, BellSouth submits that the Commission should move this issue to the Generic Proceeding for consideration and resolution. The

Joint Petitioners, however, do not agree, so I will present BellSouth's position on this issue in my direct testimony.

Q. WHAT IS BELLSOUTH'S POSITION ON ITEM 51B?

A. BellSouth will provide notice to CLECs stating the cause upon which BellSouth rests its allegations of noncompliance with the service eligibility criteria at least thirty (30) calendar days prior to the date BellSouth seeks to commence the audit. The purpose of an EEL audit is to assess, via an independent, third party auditor, whether, and the extent to which, CLECs are complying with the FCC's EEL Eligibility Criteria. A requirement to identify specific circuits and supporting documentation beforehand defeats the purpose of the compliance audit and is not required by the *TRO*.

Q. WHAT IS BELLSOUTH'S POSITION ON ISSUE 51C?

A. The audit should be conducted by an independent auditor and the auditor must perform its evaluation in accordance with the standards established by the American Institute for Certified Public Accountants (AICPA). The auditor will perform an "examination engagement" and issue an opinion regarding the CLEC's compliance with the qualifying service eligibility criteria. The independent auditor's report will state whether or not the CLEC has complied in all material respects with the applicable service eligibility criteria. Consistent with standard auditing practices, such audits require compliance testing designed by the independent auditor, which typically include an

examination of a sample selected in accordance with the independent auditor's judgment.

BellSouth will select the auditor. As paragraph 627 of the *TRO* states, "In particular, we conclude that incumbent LECs may obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria." (Emphasis added). BellSouth's selection of an audit firm should be immaterial as long as the audit firm conducts the audit pursuant to the standards of the AICPA, which is required by the *TRO* and which BellSouth and the Joint Petitioners have already agreed to.

Item 65; Issue 3-6: Should BellSouth be allowed to charge the CLEC a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic? (Attachment 3, Sections 10.10.1 – KMC; 10.8.1 – NSC; 10.13 - XSP)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. First, it is important to understand that BellSouth is not required to provide a transit traffic function because it is not a Section 251 obligation under the 1996 Act. Therefore, should BellSouth agree to provide the transit traffic function, it should be at rates, terms, and conditions contained in a separately negotiated agreement or, in the absence of such an agreement, pursuant to BellSouth's transit traffic tariff. However, if BellSouth agrees to include this function in its

Agreement, that fact should not be used to penalize BellSouth and impose rates for a service that, pursuant to a separate agreement, the Commission would not even be privy to. BellSouth should be able to impose upon a CLEC, including the Joint Petitioners, a Tandem Intermediary Charge for local transit and ISP-bound transit traffic because BellSouth: (1) is not obligated to provide the transit function to a CLEC; and (2) the CLEC has the ability, and, indeed, the right pursuant to Sections 251(a) & (b) of the 1996 Act, to request direct interconnection to other carriers. Interestingly, many CLECs route their traffic through BellSouth because they find it more efficient and economical than directly interconnecting with other carriers. In this arbitration, however, the Joint Petitioners want to obtain this more efficient, more economical alternative from BellSouth at a cheaper rate, such as TELRIC, or even at no rate at all.

But BellSouth incurs costs beyond those for which the Commission-ordered TELRIC rates were designed to address, such as; 1) the costs of sending records to the CLECs identifying the originating carrier, 2) the costs of ensuring that BellSouth is not being billed for a third party's transit traffic, and 3) the costs BellSouth has incurred and continues to incur due to disputes arising from the failure on the part of the CLECs to enter into traffic exchange arrangements directly with terminating carriers. BellSouth does not currently recover those costs in any other form.

Q. PLEASE EXPLAIN WHY BELLSOUTH IS NOT REQUIRED TO ACT AS A TRANSIT SERVICES PROVIDER FOR CLECS OR ANY OTHER

CARRIERS.

A. Although BellSouth clearly has an obligation to interconnect with other carriers under section 251(c)(2) of the 1996 Act, it is BellSouth's position that ILECs do not have a duty to provide transit services for other carriers. Indeed, in its *Virginia Opinion and Order*[3] released July 17, 2002, the Wireline Competition Bureau of the FCC acknowledged that the FCC has never imposed a duty to provide transit services, stating as follows:

> We reject AT&T's proposal because it would require Verizon to provide transit service at TELRIC rates without limitation. While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the Commission's rules implementing section 251(c)(2), the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such a duty. In the absence of such a precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates. Furthermore, any duty Verizon may have under 251(a)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.

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[3] See *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(3)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration,* CC Docket No. 00-218, *In the Matter of Petition of Cox Virginia Telecom, Inc. Pursuant to Section 252(3)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Arbitration,* CC Docket No. 00-249, and *In the Matter of Petition of AT&T Communications of Virginia Inc. Pursuant to Section 252(3)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc.* CC Docket No. 00-251 Memorandum Opinion and Order dated July 17, 2002 (*Virginia Opinion and Order*).

Id. at ¶ 117 (emphasis added).

Although the Wireline Competition Bureau of the FCC made a similar finding at ¶ 119 of the *Virginia Opinion and Order* regarding WorldCom, it also made an additional finding regarding Verizon's duty to serve as a billing intermediary, stating as follows:

> WorldCom's proposal would also require Verizon to serve as a billing intermediary between WorldCom and third-party carriers with which it exchanges traffic transiting Verizon's network. We cannot find any clear precedent or Commission rule requiring Verizon to perform such a function. Although WorldCom states that Verizon has provided such a function in the past, this alone cannot create a continuing duty for Verizon to serve as a billing intermediary for the petitioners' transit traffic. We are not persuaded by WorldCom's arguments that Verizon should incur the burdens of negotiating interconnection and compensation arrangements with third-party carriers. Instead, we agree with Verizon that interconnection and reciprocal compensation are the duties of all local exchange carriers, including competitive entrants.

Id. at ¶ 119.

Furthermore, the *TRO* clearly reaffirmed the fact that the FCC's "rules have not required incumbent LECs to provide transiting." *See TRO,* at fn 1640.

Consistent with the 1996 Act and the FCC's *TRO* and *Virginia Opinion and Order*, BellSouth is only willing to agree to provide a transiting function where

it can receive compensation for the use of its network in switching and transporting the CLEC's traffic.

Item 88; Issue 6-5: What rate should apply for Service Date Advancement (a/k/a service expedites)? (Attachment 6, Section 2.6.5)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. BellSouth's obligations under Section 251 of the 1996 Act are to provide certain services in non-discriminatory ("standard") intervals at cost-based prices. There is no Section 251 requirement that BellSouth provide service in less than the standard interval. Nor is there any requirement for BellSouth to provide faster service to its wholesale customers than to its retail customers. Because BellSouth is not required to provide expedited service pursuant to the 1996 Act, the Petitioners' request is not appropriate for Section 251 arbitration and it should not, therefore, be included in the Agreement. Moreover, because it is not a Section 251 requirement, TELRIC rates should not apply.

Importantly, no Commission in BellSouth's region has required BellSouth to provision UNEs on an expedited basis. To the contrary, in the context of performance measurement plans, which are designed to ensure BellSouth's continued compliance with its Section 251 obligations, *all* Commissions in BellSouth's region have required BellSouth to provision UNEs in accordance with *standard* intervals and pay SEEM penalties if BellSouth fails to provision UNEs within such intervals. Because expedited service provisioning of UNEs

is not an obligation under Section 251, the cost-based pricing standards of Section 252(d) do not apply. Further, from a policy perspective, any requirement that forces BellSouth to price voluntarily-offered services at TELRIC prices will chill BellSouth's willingness to voluntarily offer such services to CLECs.

Item 97; Issue 7-3: When should payment of charges for service be due? (Attachment 7, Section 1.4)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. Payment for all services identified on the bill should be due on or before the next bill date (Payment Due Date) in immediately available funds.

Q. PLEASE PROVIDE RATIONALE FOR BELLSOUTH'S POSITION.

All customer due dates and treatment notices are generated the same way; therefore, it is not feasible to do something different for one customer versus another. For BellSouth to modify its billing systems and collections processes to accommodate the Joint Petitioners would involve substantial costs. Further, such modifications are unwarranted given the fact that, in granting BellSouth long distance authority in South Carolina, both this Commission and the FCC determined that BellSouth's billing practices are non-discriminatory.[4]

[4] Memorandum Opinion and Order, *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina,* WC

Item 100; Issue 7-6: Should CLEC be required to pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination? (Attachment 7, Section 1.7.2)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. Yes, if the CLEC receives a notice of suspension or termination from BellSouth as a result of the CLEC's failure to pay timely, the CLEC should be required to pay all undisputed amounts that are past due as of the date of the pending suspension or termination action.

Q. PLEASE PROVIDE SUPPORT FOR YOUR POSITION.

A. By definition, the collections process is triggered when a customer does not pay their bills according to the terms of the Agreement. Once a CLEC fails to meet its financial obligations and the matter is referred to collections, the risk associated with the customer is higher, based on the customer's own behavior. Under the Joint Petitioners' proposed language, BellSouth would be limited to collecting the amount that was stated in the past due letter regardless of the customer's payment performance for subsequent bill cycles. Often, after

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Docket, No. 02-150, FCC02-260 (Rel. Sept. 18, 2002) at ¶ 174 ("Like the state commissions, we find that BellSouth provides nondiscriminatory access to its billing functions. BellSouth's performance data demonstrates its ability . . . to provide wholesale bills in a manner that gives competing carriers a meaningful opportunity to compete.)

receipt of a notice of past-due charges, the Parties will enter into discussions related to payment arrangements in an effort to resolve the matter without the need for suspension or termination. During this time, while BellSouth is working with the CLEC to avoid disruption of access to ordering systems or of service to end users, even though the CLEC has not paid for the services, BellSouth is continuing to provide service to the CLEC and any additional payments that become past due subsequent to the first notice should be rectified by the CLEC at the same time as it pays for the original past due charges. Again, this situation only arises when a CLEC fails to fulfill its most fundamental contractual obligation --paying for the services it receives in a timely manner. BellSouth should not be penalized for its efforts in continuing to provide services while payment arrangements are worked out. Indeed, it would not be in the end users' best interests to incent BellSouth to take a stricter approach to suspending or discontinuing service when a CLEC fails to make the payments that it is contractually obligated to make in a timely manner. BellSouth has the right and responsibility to protect itself from the higher risk associated with non-payment by insuring that customers are not allowed to continue to stretch the terms of the contract and increase the likelihood of bad debt.

Q. HAS BELLSOUTH RECENTLY PROPOSED AMENDED LANGUAGE IN AN EFFORT TO RESOLVE THIS ISSUE?

A. Yes. To address the Joint Petitioners' asserted concerns about "guessing" the undisputed past due amount that must be paid to avoid suspension of ordering

capability or termination of service, BellSouth recently offered revised, compromise language to the Joint Petitioners that will eliminate any such perceived "guess work", while preserving BellSouth's right to take action based on the failure to pay undisputed amounts past due. BellSouth proposes the following amended language in Section 1.7.2 of Attachment 7 for the purposes of this arbitration. The new, revised language is bolded, reflecting the change from BellSouth's prior language for Section 1.7.2 of Attachment 7.

> [BellSouth Version] BellSouth reserves the right to suspend or terminate service for nonpayment. If payment of amounts not subject to a billing dispute, as described in Section 2, is not received by the bill date in the month after the original bill date, BellSouth will provide written notice to <<customer_short_name>> that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if payment of such amounts, and all other amounts not in dispute that become past due **subsequent to the issuance of the written notice ("Additional Amounts Owned")** ~~before refusal, incompletion or suspension~~, is not received by the fifteenth (15^{th}) calendar day following the date of the notice. In addition, BellSouth may, at the same time, provide written notice that BellSouth may discontinue the provision of existing services to <<customer_short_name>> if payment of such amounts, and all other **Additional Amounts Owed** ~~amounts not in dispute~~ that become past due **subsequent to the issuance of the written notice** ~~before discontinuance~~, is not received by the thirtieth (30^{th}) calendar day following the date of the initial notice. **Upon request, BellSouth will provide information to <<customer_short_name>> of the Additional Amounts Owed that must be paid prior to the time periods set forth in the written notice to avoid suspension of access to ordering systems or discontinuance of the provision of existing services as set forth in the written notice.**

This language should be acceptable to the Joint Petitioners since it removes any concerns the Joint Petitioners may have about "guessing" the total amounts past due at any given time.

Item 101; Issue 7-7: How many months of billing should be used to determine the maximum amount of the deposit? (Attachment 7, Section 1.8.3)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. It is BellSouth's position that the average of two (2) months of actual billing for existing customers or estimated billing for new customers should be used to determine the maximum amount of the deposit. Such a deposit is consistent with the standard practice in the telecommunications industry, BellSouth's practice with its end users, and with the practice employed by the Joint Petitioners with its own customers.

Q. DO THE PETITIONERS HAVE ESTABLISHED POLICIES REGARDING THE AMOUNT OF DEPOSIT THAT MAY BE REQUIRED FROM THEIR CUSTOMERS?

A. Yes. In South Carolina, the Joint Petitioners' deposit policies contained in their tariffs specify that deposits may be required in an amount no greater than two months of estimated billing. (*See* KMC's Tariff at §2.5.4(A), NuVox's Tariff at §2.6.1(A), and Xspedius' Tariff at §2.5.3.1, Exhibit KKB-1)

Item 102; Issue 7-8: Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to the CLEC? (Attachment 7, Section 1.8.3.1)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. No, a CLEC's deposit should not be reduced by past due amounts owed by BellSouth to the CLEC. The CLEC's remedy for addressing non-disputed late payment by BellSouth should be suspension/termination of service or assessment of interest/late payment charges similar to BellSouth's remedy for addressing late payment by the CLEC. KMC has already pursued one of these options with BellSouth – it can bill BellSouth for late payment charges today.

BellSouth is within its rights to protect itself against uncollectible debts on a non-discriminatory basis. BellSouth *must* protect against unnecessary risk while providing service to all requesting CLEC providers. The Petitioners are not faced with the same obligation.

BellSouth is willing to agree that, in the event that a deposit or additional deposit is requested of the CLEC, such deposit request shall be reduced by an amount equal to the undisputed past due amount, if any, that BellSouth owes the CLEC for services billed pursuant to Attachment 3 of the Interconnection Agreement at the time of the request by BellSouth for a deposit. However, when BellSouth pays CLEC the undisputed past due amount, BellSouth would

be unsecured to the extent of that amount unless there is an obligation on the CLEC's part to provide the additional security necessary to establish the full amount of the deposit that BellSouth originally required. Consequently, any such obligation to offset undisputed past due amounts owed by BellSouth against a deposit request would only be reasonable if BellSouth would be secured in the full amount upon payment by BellSouth of any undisputed past due amount.

Item 104; Issue 7-10: What recourse should be available to either Party when the Parties are unable to agree on the need for or amount of a reasonable deposit? (Attachment 7, Section 1.8.7)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. If a CLEC does not agree with the amount or need for a deposit requested by BellSouth, the CLEC may file a petition with the Commission for resolution of the dispute and BellSouth would cooperatively seek expedited resolution of such dispute. BellSouth shall not terminate service during the pendency of such a proceeding provided that the CLEC posts a payment bond for half the amount of the requested deposit during the pendency of the proceeding. It would not be reasonable to expect BellSouth to remain completely unsecured, or inadequately secured, during the pendency of a proceeding the purpose of which is to determine if there is a need for a deposit. In fact, to allow such a situation to exist would simply encourage CLECs that are on the verge of filing bankruptcy, and that have been determined to pose a high risk to BellSouth

based on the very specific and objective criteria set forth in the Interconnections Agreement, to file a complaint in order to delay the payment of a deposit while they ready themselves for bankruptcy filing. A requirement that the CLEC post a payment bond for half of the requested deposit amount takes into consideration the disagreement between the parties with respect to the need for or the amount of a deposit request but also protects BellSouth during the resolution of any dispute over the amount of the deposit.

Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

A. Yes.

[Docs #583712]

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused the Direct Testimony of Kathy K. Blake in Docket No. 2005-57-C to be served upon the following this May 11, 2005:

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